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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1943**

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**No. 139**

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**FRANKLIN PERRY,**

*Petitioner,*

*versus*

**THE UNITED STATES OF AMERICA.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT.**

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The petitioner, Franklin Perry, prays that a writ of certiorari issue out of this Honorable Court to review the final judgment and decision of the United States Circuit Court of Appeals for the Tenth Circuit, entered on or about the 29th day of May, 1943 (R. 53), affirming the judgment and sentence of the District Court of the United States for the District of New Mexico (R. 12), wherein the petitioner was adjudged guilty of an offense under the Postal Laws, towit, Section 338, Title 18, U. S. C. A.

**Statement of Facts.**

Petitioner, Franklin Perry, was indicted in the United States District Court of New Mexico for violation of Sec. 338, Title 18, U. S. C. A. The indictment was in five counts

and after prosecution rested the court directed a verdict of not guilty as to the first three counts and submitted the case to the jury on counts four and five and the jury convicted petitioner on both of these counts and sentence was given thereon (R. 12).

The indictment charged the petitioner with having devised and intended to devise a scheme to defraud and obtain money and property by false and fraudulent pretense, representations and promises from William J. Dietrich, Albert W. Willauer, Mabel Willauer, and others, including the public generally (No evidence was offered or attempt made to support any charge of defrauding any persons other than those named above), by inducing them to pay money to the defendant for the purchase, recording and delivery of assignments of leases for oil and gas on State lands in New Mexico, and that pursuant thereto the defendant did make and cause to be made false and fraudulent pretenses and representations in order to induce the victim to pay the money for such leases (R. 1, 2).

The indictment further alleges (R. 2) that it was a part of the scheme and artifice that the defendant would and did, through the use of the Post Office \* \* \* of the United States, purchase and obtain FROM AN OIL LEASE BROKER LOCATED IN SANTA FE, certain forms purporting to be gas and oil leases on lands situated in the State of New Mexico. That as a further part of the scheme, AFTER THE SALE OF SAID OIL LEASES TO THE VICTIMS, defendant did use and cause to be used the Post Office \* \* \* of the United States in sending said oil leases to the office of the Commissioner of Public Lands of New Mexico for recording (No evidence of such mailing was offered to support this allegation) and for returning recorded oil and gas leases from said Commissioner to the victims. That as a further part of the scheme to defraud, the defendant would and did obtain,

FROM AND THROUGH AN OIL LEASE BROKER IN SANTA FE, a lease covering two thousand acres of land, and that said lease would be made by the Commissioner \* \* \* as lessor, to said defendant as lessee and that defendant would and did make assignments of smaller tracts to the victims who could be induced by said defendant to pay their money; that it was further a part of the said scheme that defendant would and did represent and pretend that the oil leases which he had for sale to the victims WERE DIRECT LEASES FROM THE STATE OF NEW MEXICO; That the lands covered thereby were located in extremely active territory; that the development of oil leases in the immediate vicinity thereof was then and there being undertaken, and that the immediate territory would be proved within four months to one year; that by reason of the development being done, an opportunity then existed for the victims to resell any oil leases bought from the defendant at an enormous profit; that the defendant would sell such oil leases for the victims, if the victims would purchase the same from him *at large profits*.

It is further charged (R. 3) that each and every one of the said representations, pretenses, artifices, promises and devises were, as the defendant then and there well knew, false and fraudulent, in this:

(a) That the oil leases which the defendant had for sale WERE NOT DIRECT LEASES FROM THE STATE OF NEW MEXICO, but on the contrary were assignments of acreage in smaller tracts, from a lease which the defendant had procured FROM A LEASE BROKER in Santa Fe; that the leases so procured by the defendant did not cover lands in extremely active territory, but the lands were located where there was no development for oil in the immediate vicinity; that the immediate territory would not be proved within four months to one year; that no opportunity existed for the

victims to resell any oil leases bought from the defendant at an enormous profit; and that the defendant could not and would not resell such oil leases at large profits for the victims.

(The foregoing is the gist of the charging portion of the indictment as set forth in Count 1, however, as aforesaid, counts 1-2 and 3 were not submitted to the jury, but because the general charging part of Count 1 is incorporated by reference in Counts 4 & 5, it has been included in the transcript (R. 1 to 3).

Count 4 alleges that the defendant having devised and intended to devise the scheme and artifice as set forth in Count 1, and for the purpose of executing and attempting to execute the same, did, on or about the 30th day of September, 1938, at Santa Fe, in the State of New Mexico and District of New Mexico \* \* \*, unlawfully, willfully, knowingly and feloniously cause to be placed in the U. S. Post Office at Santa Fe, New Mexico, to be sent or delivered by the Post Office Establishment of the U. S., a certain writing enclosed in a postpaid envelope addressed to Albert W. and Mabel I. Willauer, Quakertown, Penn.

Count 5, after repeating the general allegations as set forth in count 4 and by reference the general charging portion of count 1, charges that, on or about, the 11th day of August, 1938, at Santa Fe, \* \* \*, the defendant did unlawfully \* \* \*, cause to be placed in the United States Post Office at Santa Fe, \* \* \*, to be sent or delivered by the Post Office Establishment \* \* \* a certain writing enclosed in a postpaid envelope addressed to William J. Dietrich, Allentown, Penn.

The petitioner claims and the Government's testimony showed without contradiction that he purchased the oil and gas leases DIRECT FROM the Sovereign State of New Mexico and that this Sovereign State sold the same to the petitioner

as oil and gas lands and charged and collected rent thereon as such; that said State by a State law, authorized him, the petitioner, to assign all or any part of the leased lands to prospective buyers; that upon such assignments the State would receive same and transfer the leased land from the petitioner direct to the buyers or assignees of the petitioner and that the leases set forth in counts 4 and 5 of the indictment were such assignments.

That the petitioner relying upon the representations of one of the Sovereign States of the Union, to wit, New Mexico, that the lands leased by petitioner were potential oil and gas lands, sold the same to the persons named in the Counts 4 and 5 as such and that he was indicted and convicted for selling and representing or repeating merely the representations made by the said State of New Mexico.

Petitioner further says that he sold the leases in the State of Pennsylvania; that he made no representations other than those based upon articles published by the State of New Mexico and opinions and honest beliefs learned through newspapers, oil journals and other sources which he had every reason to believe were authentic; that no testimony was presented at the trial which could constitute fraud or misrepresentation; that no testimony was produced to show that he ever MAILED OR CAUSED TO BE MAILED any letter or in anywise used or caused to be used the United States Post Office Establishment in completing the sale of said leases; that as aforesaid he was in Pennsylvania, never was in New Mexico, did not know any person living in New Mexico, never authorized or caused any person to use the mails, but on the contrary he made the sales in Pennsylvania and same were fully and entirely made and consummated within Pennsylvania and the assignees sent the leases to the Commissioner of Public Lands in New Mexico to be recorded for their own protection and that the Commissioner of Public Lands of New Mexico sent the

same to the parties mentioned in counts 4 and 5 as a public duty (R. 11); that the petitioner did not know the Commissioner of Public Lands and that petitioner could not have prevented said Commissioner from doing the only act set forth in the indictment as an act of using the mails because the said Commissioner acted solely under and by a law or rule laid down by the Sovereign State of New Mexico and further if the Commissioner of Public Lands did mail the State leases or assignments to the persons named in counts 4 and 5, (Willauer and Dietrich) such mailing was not using the mails in executing any scheme, for the said act of the Commissioner was done long after the petitioner had consummated the sale and the act of mailing, if done as alleged, was in no wise done "for the purpose of executing such scheme \* \* \*" (words of the statute). If the record is carefully examined not ONE WORD will be found to even indicate that petitioner caused the Commissioner \* \* \* to do any act of mailing. Not one person was called to testify that the assignments were mailed from the Commissioner's office and there is no presumption that petitioner caused the Commissioner to use the mails, if he did so use the mails. In prosecutions under Sec. 338, Title 18, U. S. C. A. the act of mailing must be proven beyond all reasonable doubt.

As aforesaid no person was called to prove actual mailing by any person. Five witnesses were used by the State, first, Ruth Piatt who merely testified regarding securing for petitioner, in her capacity as an Abstractor, leases direct from the State to the Petitioner in direct contradiction to the allegations of the indictment; secondly, Mabel Willauer and her husband, Albert W. Willauer, both living in Pennsylvania and had never been in New Mexico or knew the Commissioner of Public Lands; and third, William J. Dietrich, who likewise lived in Pennsylvania and those witnesses did not nor, could not, have testified regard-



ing any mailing done in New Mexico, and the only remaining witness, Alexander Andreas, a geologist, was not mentioned about mailing and did not mention mailing, *so there is not one word of testimony to show who mailed the assignments* or that they were, in fact, ever mailed and the Government failed to make out a case.

## **ARGUMENT.**

### **Jurisdiction.**

The only jurisdiction which the Federal Courts would have is based upon Sec. 338, Title 18, U. S. C. A. and the GIST of the offense is "USING of the MAILS" and the prosecution must prove its case not only beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis.

*Bechman v. U. S.*, 96 F. 2nd, 15,  
*Brady v. U. S.*, 24 F. 2nd, 405,  
*Havener v. U. S.*, 49 F. 2nd, 196.

"In prosecution for using the mails to defraud, matter mailed must be step in attempt to execute the scheme."

*Barnes v. U. S.*, 25 F. 2nd, 61.

Even though there was a scheme to defraud and actual misrepresentations made if the mails were not used in the execution of the scheme the Federal Courts have no jurisdiction, so upon examination of the entire record in this case the very best case presented by the Government was: That after the petitioner had sold the leases as set forth in counts 4 and 5, the only counts submitted to the jury, and after the entire transaction had been fully and completely consummated in the State of Pennsylvania, petitioner had made the assignments and had been paid for same in full and the leases were delivered in Pennsylvania, the Com-

missioner of Public Lands of New Mexico, as a part of his public duty, mailed a copy of the recorded assignments to the persons named in counts 4 and 5. The original leases were not mailed by the Commissioner to the persons, only a copy and this copy in no wise aided the sale, effected the title or was the mailing of such copy done "For the purpose of executing such scheme" (words of the statute). If the Commissioner did mail these copies to the persons named it was merely to show that he, the Commissioner, had performed a duty imposed upon him by law. The recording and mailing in no sense of the word changed or effected the title to the assignments or aided petitioner in consummating the transaction, as the transaction was completed long before the Commissioner acted.

"Where the charge and evidence shows that the mailing was done after the transaction was fully consummated, no conviction can be had under Sec. 338, Title 18, U. S. C. A.

*Dyhre v. Huspeth*, 106 F. 2nd, 286.

*Fatal Variance:*

The indictment charges that "It \* \* \* was a part of said scheme and Artifice to defraud that the defendant would, and did, OBTAIN FROM AND THROUGH AN OIL LEASE BROKER IN SANTA FE, \* \* \* a lease covering approximately two thousand acres of land", and "it was further a part of said scheme and artifice to defraud the victims that the defendant would, and did, represent and pretend that he could acquire FROM THE STATE OF NEW MEXICO an oil lease \* \* \* That each and every one of the representations, pretenses, artifices, promises and devises were, as the defendant then and there well knew, false and fraudulent, in this: (a) That the oil leases which the defendant had for sale WERE NOT DIRECT LEASES FROM THE STATE OF NEW MEXICO (E. 3), but to the contrary were \* \* \* from a lease

which the defendant PROCURED FROM A LEASE BROKER IN SANTA FE."

In a simple statement the indictment charged the petitioner with representing falsely that he was selling oil and gas leases which were made directly by the State of New Mexico, when in truth, he did not have leases direct from the State, but had procured them from an oil broker in Santa Fe.

Now the Government's proof showed beyond all question of doubt that the petitioner HAD AND SOLD ONLY LEASES ON STATE LANDS WHICH HE HAD SECURED DIRECT FROM THE STATE OF NEW MEXICO and that he never had offered for sale or sold a single acre of leased land, which he had procured from an OIL LEASE BROKER in Santa Fe or elsewhere and in the prosecutors brief, page 7, speaking of this variance, he says:

"It is true that the proof, as to this point, does not conform with the allegations of the indictment, but we submit that the VARIANCE is immaterial \* \* \*".

Here the very statement which the indictment charges was the misrepresentation, to wit, selling a lease that was obtained from an oil broker and not from the State direct and representing that it was a lease Direct from the State and yet the prosecutor says that the allegation which he set forth with such certainty and exactness need not be proven, but that he can prove just the opposite and that there is no variance.

The petitioner came into court to meet a charge that he defrauded Mabel and Albert Willauer (Count 4) and William Diethrich (Count 5) by representing to them that he was selling to them an oil lease which he had procured direct from the State of New Mexico when in truth he had not procured a lease direct from the said State, but had, and was selling, them a lease which he had procured from

an oil lease broker and the inference was that thereby the petitioner was selling an inferior lease or leases, but the evidence showed that the leases were exactly as represented, to wit, State Leases, oil and gas leases sold by the Sovereign State of New Mexico as potential oil and gas lands, Direct to the defendant.

It might not have been necessary for the pleader to have stated how the leases were procured, but having said it and having made the statement the basis of the misrepresentation he must prove it as charged and when his own witnesses prove the exact opposite there is a fatal variance if there was ever such in a criminal case. This is the most glaring variance possible, to state a proposition and prove the direct opposite.

#### **No Evidence of Devising a Scheme or Artifice to Defraud.**

As a matter of actual fact the only basis of any fraud was the selling of a lease obtained from an oil broker and representing that it was a lease procured direct from the State and the prosecution admits that it failed to prove this allegation, but by its own witnesses, Ruth Piatt and Alexander Andreas, the Government disproved its charge of misrepresentation in this regard. The other allegations about the leases being in the vicinity of development is a mere opinion as to what constitutes vicinity in an oil field and as to the value of the leases sold the claim that the parties mentioned in counts 4 and 5 did not or could not have made big or large profits is belied by the Government's own witnesses, Willauers testified (R. 24, 26) that they paid \$500.00 for the leases and within short time thereafter refused to sell the same leases for \$1,000.00 or 100% profit on the transaction and this is big profits or in the words of the indictment "Large Profits" which the indictment says the petitioner said the buyers would make by purchasing the leases from him.

1. Now your petitioner claims that the District Court of the United States for the District of New Mexico had no jurisdiction as there was NO PROOF of mailing by the petitioner or of the petitioner causing the mails to be used and that the only use of the mails, and this was not properly proven by a word of testimony, was the act of a public official in the line of his duty sending to the owners copies of recorded State leases on State owned lands, or in other words mailing out copies of State records.

2. The Government set forth in the indictment a charge that the petitioner was misrepresenting the lands which he was selling as State Lands or leases, when they were not State leases, but were leases that petitioner had procured from an oil lease broker in Santa Fe and the Government proved and admitted that the petitioner was selling only State leases and had not procured the leases from any oil broker and the variance was/is fatal.

3. The Government alleged that the scheme and artifice to defraud was the selling of leases on oil and gas lands and representing that they were oil and gas lands and the proof showed that the State of New Mexico leased the lands to the petitioner as oil and gas lands and charged rents thereon as such and the petitioner could hardly be held for repeating or restating the State's claims, and that to be guilty of a crime by having faith in a representation of a State seems to violate the spirit of the constitution.

4. The Government alleged that the petitioner represented that the leased lands he sold were in the vicinity of Development and the proof showed that the lands were near large tracts owned by major oil companies and at best the Government's evidence showed mere salesman's boosting, based upon newspaper, oil journals and representations made by the State of New Mexico and in this connection, to use the statement of a Florida jurist: "No man can say

positively that there is oil under any particular tract, such representations that there is oil on certain lands is, at best, the speaker's opinion and does not amount to misrepresentation."

5. The indictment alleges that the leases were represented as valuable and that the buyers could sell same at large profits and the testimony by the Government showed that the leases which the petitioner sold for \$500.00 could have been sold by the buyers for \$1,000.00 or a profit of one hundred per cent within a short time after buying and that the buyers refused to sell, by inference proving that the leases were valuable and that large profits could have been made by the persons named in the indictment, counts 4 and 5, so that no person was, in fact, defrauded.

6. Petitioner respectfully submits that the Government did not sustain its claims and prove a case sufficient to have warranted the Court in submitting same to a jury and that the Court erred in not directing a verdict of not guilty on all counts.

7. Lastly petitioner says that the Honorable Justice of the Circuit Court of Appeals must have misunderstood or misread the transcript, as the Government did not offer or have the envelope in which Government's Exhibit 5 was enclosed and same was not received in evidence (R. 33), but the learned Justices in their opinion, (R. 55, say: "The lease assignment, *together* with the *envelope* in which the same was transmitted to the lessee, WAS ADMITTED in evidence." This error as to the envelope is important as it shows that the justices had in mind some evidence of mailing. The witness merely stated that he received the document, assignment of the recorded copy of the lease and of course he could not say it was placed in the mails in New Mexico or that the petitioner caused it to be placed in the

mails, if it was ever in the mails, as the witness was never in New Mexico and did not know the Commissioner or any person from his office.

**Conclusion.**

It is respectfully submitted that upon reading of the entire record this Honorable Court will grant the petition for a writ of certiorari and we believe that if the case is presented to this Court that it will find that the trial court was without jurisdiction; that there was a fatal variance and that there was no testimony of any scheme to defraud; that the mails were not used for the purpose of executing any scheme and that there was not sufficient evidence to bring the case within the statute and that the Government failed to overcome the presumption of innocence and that the trial justice should have directed a verdict of not guilty on all counts of the indictment.

Respectfully submitted,

MAYER J. SAWYER,  
*Attorney for the Petitioner.*

Filed July 2nd, 1943.

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